

October 18, 2007

**Submitted Testimony to the
Federal Trade Commission
Behavioral Advertising Town Hall**

**Peter P. Swire
Professor, Moritz College of Law of the Ohio State University
Senior Fellow, Center for American Progress**

Executive Summary

As search and online advertising giant Google seeks to merge with online advertising leader DoubleClick, the debate has been greatly confused about how privacy issues fit into antitrust analysis. This testimony draws on my experience both as a professor of antitrust and privacy law. It explains as a general matter how privacy harms are relevant to antitrust analysis.

In brief, privacy harms can reduce *consumer welfare*, which is a principal goal of modern antitrust analysis. In addition, privacy harms can lead to a reduction in the *quality of a good or service*, which is a standard category of harm that results from market power. Where these sorts of harms exist, it is a normal part of antitrust analysis to assess such harms and seek to minimize them.

These sorts of privacy harms have not historically been important in antitrust analysis. For a clothing merger, higher prices and lower quality of clothing are relevant harms to consumers. For an auto merger, it is the price and quality of cars. But for a merger that combines world-class databases, the way customer data is used after the merger becomes relevant. This testimony uses examples from the proposed merger to illustrate how a merger or dominant firm behavior might reduce consumer welfare or product quality.

The analysis here shows why it is logical to consider privacy remedies as part of merger analysis. Traditional antitrust analysis examines a proposed merger and often sets conditions on approval -- the merger can proceed for aspects that create consumer welfare, but cannot proceed for aspects where harms outweigh the benefits. Where consumers suffer from lower product quality and reduction of consumer welfare, such as through privacy harms, it thus is logically consistent to consider merger conditions that address privacy harms.

This testimony does not make any recommendation about the pending merger proposal of Google and DoubleClick. Instead, it seeks to address a fundamental intellectual issue in the FTC's examination of online behavioral profiling -- how, as a general matter, privacy fits into the antitrust analysis of industries that depend on intensive use of consumer information.

Background of this testimony.

I am the C. William O'Neill Professor of Law at the Moritz College of Law of the Ohio State University, and a Senior Fellow at the Center for American Progress. This fall I am teaching an unusual pair of courses: Federal Antitrust Law and a seminar on The Law of Privacy and Cyberspace. In light of my current teaching topics, I have been trying to figure out the intersection of privacy and antitrust law. I have stayed essentially silent publicly in recent months about online behavioral profiling and the proposed merger.¹ This testimony reflects my considered judgment about how privacy issues fit within the traditional framework of antitrust analysis.²

This testimony draws on my considerable experience in privacy law and online behavioral profiling. From early 1999 until early 2001 I served as Chief Counselor for Privacy, in the U.S. Office of Management and Budget. During that time, I was the lead White House official during consideration of issues raised by the proposed merger of DoubleClick's online databases with the offline and personally-identifiable information contained in the Abacus databases.³ My writings on privacy, consumer protection, and other topics are available at www.peterswire.net. These writings include application of economic analysis to privacy issues.⁴

Previous Discussions of Antitrust and Privacy

There was little or no analysis of the intersection of antitrust and privacy before the announcement of the proposed merger of Google and DoubleClick. Microsoft, the Electronic Privacy Information Center (EPIC), and Senator Herbert Kohl have given the most visible discussions of these issues to date. In this section, I briefly indicate how these three existing arguments fit within the broader framework of antitrust analysis. I do not take any position here on the three existing arguments.

Microsoft has emphasized what antitrust economists call the "exclusionary effects" of the proposed merger -- ways that the merger would exclude effective competition. In recent testimony before the Senate Judiciary Subcommittee on Antitrust, Competition, and Consumer Rights, Microsoft General Counsel Brad Smith said: "These privacy issues have antitrust consequences. Given the nature and economics of online advertising, this concentration of user information means that no

other company will be able to target ads as profitably. It will substantially reduce the ability of others to compete.”⁵ In this brief statement, Mr. Smith sought to explain how merger of the large Google and DoubleClick databases would exclude other companies from effectively competing with the merged firm. Assessment of this exclusionary theory depends on facts available to regulators in the U.S. and European Union, but not to the general public. It would seem to be a normal part of antitrust analysis for the regulators to examine this sort of exclusionary effect in considering a merger or dominant firm behavior. That is, antitrust law should consider any exclusionary effects based on databases of personal information.

A different approach is to argue that a merger violates fundamental human rights to privacy. In the same hearing, EPIC President Marc Rotenberg stated: “It is our view that unless the Commission establishes substantial privacy safeguards by means of a consent decree, Google’s proposed acquisition of Doubleclick should be blocked.”⁶ The focus of Mr. Rotenberg’s testimony, and of previous EPIC filings on the issue, has been on the need to consider information privacy issues explicitly in the review of the proposed merger. EPIC’s complaint to the FTC concerning the merger says: “The right of privacy is a personal and fundamental right in the United States.” To the extent that such a right is recognized, then official government action, such as antitrust review, should seek to minimize or avoid the infringement of that right.

A third critique of the merger is that it will lead to undue concentration of economic power. Senator Kohl, chairman of the recent Senate hearing, stated: “Some commentators believe that antitrust policymakers should not be concerned with these fundamental issues of privacy, and merely be content to limit their review to traditional questions of effects on advertising rates. We disagree. The antitrust laws were written more than a century ago out of a concern with the effects of undue concentrations of economic power for our society as a whole, and not just merely their effects on consumers’ pocketbooks. No one concerned with antitrust policy should stand idly by if industry consolidation jeopardizes the vital privacy interests of our citizens so essential to our democracy.”

Senator Kohl emphasizes the long tradition in antitrust law that addresses “undue concentrations of economic power” in society. That theme of antitrust law was ascendant in the 1960’s, in cases such as *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963). More recent years, however, have seen much less emphasis on combating concentration of economic power, and much more attention on effects on price and related measures of consumer welfare. Senator Kohl appears to be suggesting that protecting against privacy harms should become an explicit factor in a revitalization of efforts to fight undue economic concentration. As privacy issues become more important in our information-driven economy, it may make sense for Congress to provide baseline legislation to protect privacy. Such legislation could conceivably clarify the role of privacy concerns in antitrust law, perhaps along the lines of what Senator Kohl was suggesting.

In contrast to these calls to consider privacy in antitrust law, Google's recent testimony treated privacy and antitrust as entirely separate issues.⁷ Much of the media coverage of the proposed merger has also treated the issues as separate. The New York Times reported that "privacy issues are not typically the concerns of antitrust officials," and quoted antitrust expert Andrew Gavil as saying "Strictly speaking, privacy is not an antitrust issue."⁸

How Privacy Harms Fit Within Traditional Antitrust Analysis

In contrast to these three approaches, there is a simpler and more general way to understand the role of privacy in antitrust law. First, privacy harms reduce *consumer welfare*, which is a principal goal of modern antitrust analysis. Second, privacy harms lead to a reduction in the *quality of a good or service*, which is a standard category of harm that results from market power.

Consumer welfare. Traditional antitrust analysis is designed to promote consumer welfare. For instance, the Supreme Court stated in *NCAA v. Board of Regents*, 468 U.S. 85, 107 (1984): "Congress designed the Sherman Act as a 'consumer welfare prescription.'" A restraint that has the effect of reducing the importance of consumer preference "is not consistent with this fundamental goal of antitrust law." *Id.*

This emphasis on "consumer welfare" or "consumer preference" is directly relevant to privacy. The most detailed research on consumer preferences has been conducted by Alan Westin, who has led numerous polls about privacy over many years. A recent and exhaustive review of these surveys found that the portion fitting into Westin's "high privacy concern" categories typically numbered 25% of the population, with that number climbing in some circumstances to 40% or higher.⁹ The largest segment in most studies was the "medium privacy concern" group. The smallest group in most studies was the "low privacy concern" group, often about 10-15% of the population surveyed.

For an online population in the United States of over 100 million people, this consistent survey data over time thus shows tens of millions of people with high privacy concern. For these individuals, their consumer preferences are subject to harm if standard online surfing shifts to a less privacy-protective structure due to a merger or dominant firm behavior. In essence, consumers "pay" more for a good if greater privacy intrusions are contrary to their preferences. Under standard economic analysis, and standard antitrust analysis, harm to consumer preferences should be part of the regulatory homework for the competition agencies -- such harms should be considered along with other harms and benefits from a proposed merger.

As mentioned in the introduction, it is easy to understand why these sorts of harms to consumer welfare are arising more prominently today. Historical Supreme Court merger cases addressed industries including grocery stores, *United States v. Von's Groceries*, 384 U.S. 270 (1966), or beer production, *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966). These industries did not intensively use consumer information, so privacy issues were simply not relevant to the merger analysis. By contrast, where

dominant firm behavior or a merger creates privacy harms, then these harms are a natural part of antitrust analysis. It would be illogical to count the harms to consumers from higher prices while excluding the harms from privacy invasions -- both sorts of harms reduce consumer surplus and consumer welfare in the relevant market.

Quality of Product or Service. Under traditional antitrust analysis, market power can be used in various ways, including to raise price or reduce the quality of a product or service. This linkage of price and product quality was explained by the Supreme Court in *National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 695 (1978): “The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain -- *quality*, service, safety, and durability - and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.” (emphasis added). The Merger Guidelines, § 4, specifically mention “improved quality” among the possible effects of efficient market behavior, along with lower prices and new products. Possible harm to product quality, due to monopoly power, has been clearly recognized in the courts.¹⁰

A merger or dominant firm behavior may have a large effect on the quality of a product in the area on online behavioral profiling. It is difficult to understand the precise ways that data will be gathered differently after consummation of a Google-DoubleClick merger. In briefings, Google has described a number of limits on data use that currently exist, but has not promised that the same limits will apply in the future.¹¹

The proposed merger may illustrate one such effect on quality. Currently, an individual using search at Google and clicking on the occasional ad has one or more cookies set by Google. (Individuals may also use one or more fully-identified products of Google’s, such as through Gmail.) Google has much less information, however, about where the individual goes after leaving the Google sites. Google often has “deep” information about an individual’s actions, such as detailed information about search terms. Currently, DoubleClick sets one or more cookies on an individual’s computers, and receives detailed information about which sites the person visits while surfing. DoubleClick has “broad” information about an individual’s actions, with its leading ability to pinpoint where a person surfs.

If the merger is approved, then individuals using the market leader in search may face a search product that has both “deep” and “broad” collection of information. For the many millions of individuals with high privacy preferences, this may be a significant reduction in the quality of the search product -- search previously was conducted without the combined deep and broad tracking, and now the combination will exist. I am not in a position to quantify the harm to consumers from such a reduction in quality.

My point instead is that this sort of quality reduction is a logical component of antitrust analysis. Before a merger, a consumer may be able to surf subject to one level of tracking, kept in a database of one magnitude. After the merger, doing a search or doing other surfing may carry with it a significantly higher level of tracking, in a larger database. To the extent that is true, then antitrust regulators should expect to assess this

sort of quality reduction as part of their overall analysis of a merger or dominant firm behavior.¹²

It is worth noting that this sort of quality analysis will not be appropriate in most mergers. For a clothing merger, the quality of the shirts and other clothes is relevant. For an auto merger, it is the quality of the cars. But for a merger that combines two world-class databases, then the way data is used after the merger is relevant. The Federal Trade Commission was deeply involved in 2000, the last time that DoubleClick proposed to merge its database with another major database. For this subset of mergers, which depend for their economic value on intensive use of customer information, then the quality of the information use is likely material to the overall effects of the merger. In such cases, antitrust regulators should not arbitrarily exclude privacy-related effects. Instead, they should consider the quality of the products post-merger, to determine the possible harms to consumers.

Remedies. The analysis here shows why it is logical to consider privacy remedies as part of antitrust analysis. Traditional antitrust analysis examines a proposed merger and often sets conditions on approval -- the merger can proceed for aspects that create consumer welfare, but cannot proceed for aspects where harms outweigh the benefits. For instance, a merger might be allowed in most geographic markets, but sales outlets might be divested in cities where the harm to competition from the merger would be high.

Where consumers suffer from lower product quality and reduction of consumer welfare, it is logically consistent to consider merger conditions that address those consumer harms. The discussion here has shown how merger or dominant firm behavior in the online profiling industry could lead to those effects -- lower quality or other reduced consumer welfare. In assessing conditions on a merger, antitrust authorities using their normal methods can thus consider conditions that reduce consumer harm (such as harm to privacy) while approving a merger that has net consumer benefits.

Efficiencies and other considerations. The discussion here does not recommend a particular outcome for the Google-DoubleClick merger or any other specific transaction. A key reason is that there are other issues essential to any merger analysis, including defining the appropriate product and geographic markets, considering efficiencies from the merger, and so on. Antitrust regulators have access to far more information on such issues than the general public. They can also seek information from the parties and other experts on relevant topics, including on the effects on privacy of a proposed merger.

Efficiencies may be especially relevant to the discussion of privacy for the online behavioral profiling industry. Proponents of a merger will emphasize benefits to consumers, such as those that occur through a more personalized surfing experience.¹³

The task of this testimony is not to estimate the efficiencies in any particular proposed merger. Instead, the goal is to illuminate the intellectual structure for how privacy issues fit into antitrust analysis. The discussion thus far has explained the importance of possible privacy harms from more intensive tracking of an individual's

surfing behavior. The Westin surveys show that there are diverse consumer preferences on privacy, with a substantial majority showing “high” or “medium” concern about privacy. For those with “low” privacy preferences, the efficiencies that result from greater tracking may be especially great. There may be mechanisms that provide efficiencies to those favoring personalization while giving effective choice about tracking to the many consumers who have “high” or “medium” privacy concern. If such mechanisms exist, then they may be appropriate conditions of a merger.

The topic of efficiencies shows an additional way that privacy harms can be logically included in antitrust analysis. To the extent proponents of the merger seek to justify the merger on efficiency grounds, such as personalization, then privacy harms to consumers should be considered as an offset to the claimed efficiencies. To give a simple numerical example, suppose that a merger analysis showed efficiencies of \$10 million. If there are privacy harms estimated at \$8 million, then the efficiencies that count should be no more than \$2 million.

Conclusion

The discussion here provides a general framework for understanding how privacy fits within antitrust law. It uses the standard tools and vocabulary of modern antitrust law. It does not suggest that privacy concerns should trump or dominate antitrust analysis. Instead, the usual antitrust analysis should go forward, considering market definition, efficiencies, and other relevant issues.

As that analysis proceeds, however, reductions of consumer welfare or quality of product are an organic part of the work of the regulatory agencies. The online behavior profiling industry is the subject of this FTC Town Hall. That industry is defined by “profiling,” or the intensive use of customer information. Where mergers or dominant firm behavior create significant effects on customers, including in their use of customer data, then those effects should be considered under antitrust law.

¹ I spoke with one reporter on background, to discuss privacy and antitrust issues. The reporter broke his promise not to quote me, and inaccurately quoted my views.

² I am writing this testimony in my capacity as a law professor and a senior fellow at the Center for American Progress, with the goal of clarifying the antitrust and privacy issues relevant to online behavioral profiling. I have not been paid by any party to write this testimony. I have done and continue to do consulting work, however, in connection with companies in the online behavioral profiling area. Notably, both Google and Microsoft are members of the Consumer Privacy Legislation Forum, a 501(c)(3) that is examining how to create workable privacy legislation in the United States. I have been an academic advisor to this Forum, and testified on its behalf before Congress in 2006. No representative of Google or Microsoft, however, was in any way involved in creation of this testimony for the Town Hall, or even knew about it in advance.

³ Also in 2000, I was the lead policy official in the drafting of guidance from the Director of the Office of Management and Budget to federal agencies about the use of cookies on federal web pages, available at <http://www.whitehouse.gov/omb/memoranda/m00-13.html>.

⁴ In June, 2003 I participated in the FTC Workshop on Information Flows, with a presentation entitled “Privacy and the Use of Cost/Benefit Analysis.” Available at <http://www.peterswire.net/ftc.costbenefit.ppt>. That presentation drew on my longer discussion

of economics and privacy in "Efficient Confidentiality for Privacy, Security, and Confidential Business Information." Available at <http://ssrn.com/abstract=383180>. Those materials address some common critiques by economists of the importance of privacy.

⁵ Testimony of Brad Smith, available at http://judiciary.senate.gov/testimony.cfm?id=2955&wit_id=6689.

⁶ Testimony of Marc Rotenberg, available at http://judiciary.senate.gov/testimony.cfm?id=2955&wit_id=6686.

⁷ Testimony of David Drummond, available at http://64.233.179.110/blog_resources/david_drummond_doubleclick_testimony.pdf.

⁸ Steve Lohr, "Google Deal Said to Bring U.S. Scrutiny," May 27, 2007, available at <http://www.nytimes.com/2007/05/29/technology/29antitrust.html>.

⁹ Ponnurangam Kumaraguru & Lorrie Faith Cranor, "Privacy Indexes: A Survey of Westin's Studies," (2005), available at <http://reports-archive.adm.cs.cmu.edu/anon/isri2005/CMU-ISRI-05-138.pdf>.

¹⁰ *E.g.*, *Been v. O.K. Industries, Inc.*, 495 F.3d 1217, 1232 (10th Cir. 2007); *Telecor Communications, Inc. v. Southwestern Bell Telephone Co.*, 305 F. 3d 1124, 1132 (2002); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421 (1995).

¹¹ I received one briefing from Google about the merger that was attended by a number of other privacy experts.

¹² It is possible that the market with privacy effects on individuals, such as the market for search, will be different than the market that is subject of other antitrust objections, such as the online advertising market. There is nothing unusual, however, about having more than one market affected by a proposed merger. The task of the antitrust regulators is to assess the effects of a merger or dominant firm behavior on any affected market.

¹³ An important topic, which I hope will be addressed in the upcoming Town Hall, is how to assess the advantages and disadvantages of price discrimination that can result from more intensive collection of information about a buyer's surfing habits. Standard economic analysis often supports such price discrimination on allocative efficiency grounds. On the other hand, where sellers have thorough knowledge about buyers, there is a predictable distribution effect -- the surplus from the transaction will shift on average from buyers to sellers.

From a consumer welfare perspective, therefore, online behavioral profiling may increase efficiency but harm consumers. Economic analysis has no general way to trade off these sorts of efficiency vs. distribution effects.